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No. ———

IN THE
SUPREME COURT OF THE UNITED STATES

DELLA J. BROWNING; JAY ELEDGE,
Petitioners,

versus

ROHM & HAAS COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In an Age Discrimination in Employment Act [ADEA] disparate treatment case, when direct evidence of discrimination is lacking, does a plaintiff create a genuine issue of material fact, and avoid summary judgment for the defendant, by presenting circumstantial evidence sufficient to permit the jury to infer that the defendant's asserted legitimate nondiscriminatory reason for the challenged employment decision is a pretext for age discrimination, regardless of whether the plaintiff proves as a matter of law each element of the *McDonnell Douglas* prima facie case test?

2. Applying the *McDonnell Douglas* inferential method of proof in an ADEA case on a motion for summary judgment, when assessing whether a plaintiff is qualified for a job at the prima facie stage, must a court examine the plaintiff's evidence independent of the asserted legitimate nondiscriminatory reason produced by the defendant?

LIST OF PARTIES

Petitioners

The petitioners, Della J. Browing and Jay Eledge have no corporate affiliations.

Respondent

The respondent is Rohm & Haas Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Della June Browning and Jay Eledge, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on October 29, 1999. In light of the anticipated decision by this Court on substantially similar issues presented in *Reeves v. Sanderson Plumbing Products, Inc.*, No.99-536, argued on March 21, 2000, Petitioners pray in the alternative that this case be held in abeyance until a decision is rendered in *Reeves*. Thereafter, if appropriate, Petitioners pray for an order granting certiorari, vacating the judgment, and remanding the case to the lower court for reconsideration in light of *Reeves v. Sanderson Plumbing Products, Inc.*, 99-536, and other intervening Circuit caselaw.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is set forth in the Appendix at 1a-14a and is unreported. The decision of the United States District Court for the Eastern District of Tennessee is reported at 16 F. Supp.2d 896 (E. D. Tenn. 1998) and is set forth in the Appendix at 15a-52a.[1]

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[1] Citations to "App." are to the appendix filed with this Petition for a Writ of Certiorari pursuant to Supreme Court Rule 14(i).

Citations to "J.A." are to the joint appendix filed in the Sixth Circuit Court of Appeals.

JURISDICTIONAL STATEMENT

On October 29, 1999, the United States Court of Appeals for the Sixth Circuit issued its decision affirming the judgment entered by the district court. A petition for panel rehearing was denied on December 28, 1999. (App. at 53a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case arises under the Age Discrimination in Employment Act of 1967 [ADEA], 29 U.S.C. §621 et seq., which states in pertinent part: "It shall be unlawful for an employer -- (1) to fail or refuse to hire . . . or otherwise discriminate against any individual . . . because of such individual's age;"

STATEMENT OF THE CASE

I. FACTS

The petitioners are two of approximately fifty former employees of the respondent Rohm & Haas Company (Rohm & Haas) who filed suit against Rohm & Haas alleging age discrimination under the ADEA when the company refused to consider them for rehire in the mid 1990's.[2] When they applied for rehire with Rohm & Haas, petitioners Browning and Eledge were forty-nine (49) and fifty-one (51) years old respectively. Both petitioners had good work records when

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[2] Some of these former employee-plaintiffs voluntarily dismissed their suits. The claims of the remaining thirty-eight plaintiffs have been consolidated and stayed in the district court. The petitioners' case proceeded because it was filed first.

previously employed by Rohm & Haas. Each petitioner was recommended for rehire on exit interviews when Rohm & Haas laid them off in 1982. Petitioner Browning formerly worked at the respondent's chemical plant in Knoxville, Tennessee for approximately six years. Petitioner Eledge formerly worked at the same Knoxville chemical plant for approximately twelve years. (J.A. at pp. 10-11, 217-18, 234-36, 239, 295-96, 301, 310-11, 317).

Layoffs from Rohm & Haas in the 1980's were governed by collective bargaining agreements, which required that more senior employees be retained over less senior employees. (J.A. at p.257). The respondent hired no new employees from 1979 until 1993. (J.A. at p.187). In the early 1990's, Rohm & Haas management was conscious that many of its workers were nearing retirement and that the company would have to hire a new workforce. (J.A. at pp.189, 259-60). On November 8, 1993, at its Knoxville chemical plant, the respondent posted new hiring criteria applicable to hourly production jobs.[3] (J.A. at p.233). The company implemented the new hiring criteria in September 1994 after transferring thirty-one of its employees from its other chemical plants to the Knoxville plant. (J.A. at pp.187, 189). Like the petitioners, these thirty-one employees qualified "by virtue of their employment at a Rohm & Haas chemical plant." (J.A.

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[3] The hiring criteria posted at the plant are as follows:

- An Associate Degree in Chemical and Environmental Engineering Technology from Pellissippi State (or equivalent degree from another school), or
- Five years of relevant experience in chemical plant operations or
- A relevant four year degree from an accredited college or university.

at p.187). Since adopting the criteria, Rohm & Haas has hired over one hundred employees at its Knoxville chemical plant. (J.A. at p.191, 307, 407).

By October 10, 1996, before the petitioners filed suit, Rohm & Haas had hired sixty-three new employees, not including the thirty-one employees transferred from its other plants. Of these sixty-three new employees, six were over forty years old. Of the six new employees in the protected age group, four were between the ages of forty and forty-five (ages 41, 43, 43, 44) when hired, and two were between the ages of forty-five and fifty (ages 47, 50) when hired. The average age of the new hires was approximately 30 years old in 1995. (J.A. at p.307).

The petitioners applied for positions with Rohm & Haas under the new hiring criterion requiring five years chemical plant experience. They submitted their applications to the employment agency responsible for screening applicants to obtain candidates with the requisite qualifications. The employment agency forwarded the petitioners' applications to the respondent because each appeared to qualify for employment by virtue of having five years experience working in a chemical plant. (J.A. at pp.132, 190-91).

Thereafter, the respondent's Assistant Human Resources Director, who has no work experience as a "chemical operator," removed the petitioners' applications from the hiring process. (J.A. at pp.131-32). The respondent's stated non-discriminatory reason for rejecting the petitioners is that the petitioners' prior chemical plant experience with Rohm & Haas is not relevant to the hourly production jobs at issue. (J.A. at pp.132, 192). Rohm & Haas officials interpret the hiring criteria by explaining that the reason the petitioners' prior chemical plant experience is

not relevant is because the petitioners produced plexiglas, which is no longer produced at the Knoxville plant, plexiglas production is purportedly less complex than production of its other chemical products, and the petitioners' plexiglas experience did not require computer familiarity or "trouble-shooting" aptitude. Because Rohm & Haas computerized its chemical manufacturing process in the mid 1980's, company management claims that by 1986 they knew that the plexiglas workers' job experience was irrelevant to its other chemical manufacturing operations. (J.A. at pp.186, 192, 257-58, 288, 327).

The petitioners rebutted the respondent's "nondiscriminatory reason" with evidence demonstrating first, that the petitioners' work experience is relevant to the available jobs; second, that "lack of relevant qualifications" was not the real reason for Rohm & Haas' decision because, for example, company management rejected them before knowing anything about their qualifications obtained since being laid off from Rohm & Haas; and third, that the criteria were not job related, but were adopted to avoid hiring the former employees, or were applied to the petitioners in a discriminatory manner.[4]

More specifically, after plexiglas production ended in 1987, and until 1994, Rohm & Haas transferred or rehired

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[4] Rohm & Haas is entitled to improve the skill level of its workforce as long as the hiring criteria are not a mask for impermissible discrimination; however, even if a jury found that the criteria were adopted for a legitimate reason, it could still find that Rohm & Haas applied the criteria to the petitioners in a discriminatory manner. Similarly, a jury could find that only the one criterion requiring a two year degree from the local community college was pretextual or adopted with a discriminatory purpose.

plexiglas workers to work at Knoxville or at other Rohm & Haas plants in non-plexiglas chemical production jobs. The respondent did not distinguish between plexiglas and non-plexiglas workers for purposes of transferring and rehiring plexiglas workers to "chemical operator" jobs. Employees making plexiglas were represented by the same union and covered by the same collective bargaining agreement as employees producing other chemical products. Rohm & Haas did not distinguish between plexiglas workers and other chemical plant workers for reductions in force, which were based on seniority regardless of the particular production job. Thus, until 1994, the respondent considered plexiglas production workers qualified to perform other chemical plant production jobs. (J.A. at pp.183-85, 257, 409).

Trainers and supervisors employed by Rohm & Haas at the time the hiring criteria were adopted and implemented assert that the petitioners' prior work experience qualified them to perform the new jobs, and that the hiring criteria were not job related. Although the respondent claims that the petitioners' work experience is not relevant to the jobs because it did not prepare them to "trouble-shoot" the chemical production process, the supervisors countered that Rohm & Haas' policy strictly prohibits chemical production workers from trouble-shooting the chemical process. These supervisory officials believe that the chemical production jobs have become easier over time with modernization of the process, not more complex as the respondent contends. (J.A. at pp.326-37, 375-86).

Applicants who appear to meet the hiring criteria are interviewed to determine the applicant's familiarity with computers and "trouble-shooting" aptitude. The respondent rejected the petitioners and other former employees as a group without interviewing them to assess their computer

familiarity, trouble-shooting aptitude, or relevant degrees or experience obtained since being laid off from Rohm & Haas. The criteria do not mention computer familiarity, nor do the employment applications. Petitioner Browning worked in a computerized manufacturing setting and as a trainer. (J.A. at pp.68, 132, 191, 236-40, 297, 312-13, 408).

Before submitting employment applications to Rohm & Haas, when the petitioners and other former laid off workers first learned that Rohm & Haas was hiring, they approached company officials to inform them of their desire to be considered for rehire. Company officials refused to speak with the petitioners and other former employees, management avoided them, discouraged them, gave them the run-around, and essentially rejected them from consideration as a group without assessing its former employees' qualifications for the hourly production jobs. Most of these former employees had worked for Rohm & Haas for more than five years, some of them had previously worked in nonplexiglas chemical production jobs, and some of them, after being laid off from Rohm & Haas, obtained work experience or education that met the respondent's hiring criteria. (J.A. at pp.295-300, 310-14, 338-60).

Rohm & Haas management did not exhibit a comparable aversion to all potential job applicants. Beginning in the early 1990's, and continuing throughout the same time frame that Rohm & Haas was refusing to talk with former employees about rehire possibilities, management was working very closely with the local community college to recruit a new workforce. Almost one half of the newly hired workforce was recruited from the local community college. (J.A. at pp.189-90, 260, 271-72, 297-98, 300, 312, 407, 425-26).

Until May 6, 1996, the Rohm & Haas plant in Knoxville required that applicants to its apprenticeship program shall be no older than age forty-seven. This age restriction was apparently legal and effective until May 1996. (J.A. at pp.341, 407, 411).

Rohm & Haas adopted hiring criteria similar to the Knoxville plant criteria in only one of its other chemical plants, even though it operates at least fourteen chemical manufacturing plants in the United States. (J.A. at pp.188, 251, 253, 362). Training for chemical plant production workers is coordinated on a corporate-wide or regional basis and not simply at each individual plant site. (J.A. at p.253). The plant where Rohm & Haas adopted hiring criteria similar to the Knoxville plant also has a large number of former workers who were laid off when the company moved its plexiglas operations to Mexico. (J.A. at pp.188, 251, 362).

II. PROCEEDINGS BELOW

The district court had jurisdiction over the original action pursuant to 28 U.S.C. §1331 because the case presented a federal question arising under the ADEA. On August 6, 1998, the district court granted the respondent's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.

The Sixth Circuit affirmed the district court decision on October 29, 1999, finding that the crux of the issue was whether the petitioners established a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Sixth Circuit stated that "[f]or the petitioners' case to proceed, however, they must demonstrate that they meet the requirements of the prima facie case as set forth in *McDonnell*

Douglas." (CA6 Op., App. p.8a). It then held that

> the district court did not err in its application of the burden-shifting analysis set forth in McDonnell Douglas and its progeny. The crux of the issue in this case is whether petitioners Browning and Eledge were qualified under the new hiring criteria, thereby satisfying the second prong of the McDonnell Douglas test and establishing a prima facie case of intentional age discrimination. The district court correctly held, however, that Rohm and Haas management appropriately determined in its business judgment that the petitioners' prior experience in its plexiglas operation did not satisfy the new hiring criteria for chemical operators.

(CA6 Op., App. p. 9a). Although Rohm & Haas offered a "nondiscriminatory reason," for its action, the Sixth Circuit focused on the *McDonnell Douglas* prima facie case test. Much of the petitioners' evidence was viewed as relevant to the prima facie case, rather than as evidence of pretext. Compounding this error, the lower court undermined the purpose and structure of the inferential proof method because it relied on the defendant's nondiscriminatory reason for not hiring the petitioners to find that the petitioners had failed to prove a prima facie case.

Once it misapplied the framework of the inferential proof method, the lower court rejected as a matter of law essentially all of the petitioners' circumstantial evidence of discrimination. For example, the lower courts rejected the affidavits from Rohm & Haas trainers and supervisors that disputed the respondent's "nondiscriminatory reason" and

demonstrated pretext. In disregarding this evidence, the Sixth Circuit approved language in the district court's opinion that utilized a "pretext-plus" standard of proof. The district court stated that "[a] petitioner has not met his or her burden of showing a genuine issue of fact on the issue of pretext merely by casting doubt on the employer's legitimate reasons for its business decisions." (Dist. Ct. Op., App. p. 39a). The Sixth Circuit affirmed, stating that the supervisors' affidavits "merely revealed reasonable differences in opinion that did not raise issues of fact relevant to a summary judgment determination. . . . There is no evidence of any age discrimination." (CA6 Op., App. p. 11a-12a). *But cf.*, *Kline v. Tennessee Valley Authority*, 128 F.3d 337 (6th Cir. 1997)(adopts a "permissive inference" standard for proving pretext).

The Sixth Circuit fails to articulate what, if any, summary judgment standard it utilized to review the district court opinion. The district court states that summary judgment practice in the Sixth Circuit "requires a court to make a preliminary assessment of the evidence, in order to decide whether the petitioner's evidence concerns a material issue and is more than de minimus." (Dist. Ct. Op., App. p. 29a). Both lower courts, however, weighed the evidence, drew inferences in the respondent's favor, viewed the petitioners' evidence piecemeal rather than in context, and disregarded the petitioners' evidence of pretext by focusing on the prima facie case. The lower courts set the petitioners' burden far too high, and in so doing, intruded on the role of the jury by granting summary judgment to the respondent.

REASONS FOR GRANTING THE WRIT

I. THIS PETITION SHOULD BE GRANTED BECAUSE IT PRESENTS ISSUES WHICH ARE IDENTICAL OR SIMILAR TO ISSUES CURRENTLY PENDING BEFORE THIS COURT IN *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, No. 99-536.

This Court recently granted certiorari in an ADEA case with substantially similar issues relating to the appropriate standards of proof under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) when a court is determining whether to grant judgment as a matter of law in a disparate treatment age discrimination case based on circumstantial evidence. This case is an instructive companion case to *Reeves* because the minor differences between the two cases compliment each other in a way that will facilitate this Court's responsibility to unify the federal law by harmonizing the aspects of *McDonnell Douglas* and its progeny where lower courts have routinely gone astray.

Reeves asks this Court whether the standards of proof are the same under Federal Rules of Civil Procedure 50 and 56. This case compliments *Reeves* because *Reeves* was decided pursuant to Rule 50, and this case presents similar proof issues under Rule 56. It may be futile for this Court in *Reeves* to clarify the proper role of a court under Rule 50 if future cases never reach the jury because the same errors are committed under Rule 56.

Reeves presents this Court with the Circuit split arising from the differing interpretations of this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). The Circuits are now holding petitioners to dissimilar standards when assessing the sufficiency of a petitioner's circumstantial evidence of discrimination. As the Fifth Circuit did in *Reeves*, the Sixth Circuit sanctioned the district court's use of the "pretext-plus" standard of proof to assess the petitioners' circumstantial evidence in this case.[5] By rejecting the petitioners' evidence of pretext as not indicative of age discrimination, the Sixth Circuit, in effect, demanded direct evidence of age discrimination.

Although the Sixth Circuit appears to prematurely terminate the pretext analysis by framing its decision in terms

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[5] The petitioners proffered affidavits from Rohm & Haas trainers and supervisors that explained, in part, that the petitioners were as qualified or more qualified than the individuals who were hired. Although rejected by the Sixth Circuit, other Circuit Courts of Appeal consider this type of evidence relevant to demonstrating the plaintiff's qualifications and pretext. *See, e.g., Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 644 (11th Cir. 1998)(when plaintiff's evidence "casts doubt on" the defendant's nondiscriminatory reason, there is a jury question; and the evidence of qualifications produced in support of the prima facie case created a genuine issue of fact as to pretext). *Lyoch v. Anheuser-Busch Companies, Inc.*, 139 F.3d 612, 615-16 (8th Cir. 1998)(affidavit from distributor with whom the plaintiff worked helped establish her qualifications); *Thomas v. Denny's Inc.*, 111 F.3d 1506, 1510 (10th Cir. 1997)(qualifications may be demonstrated through plaintiff's own testimony and that of co-workers in a position to know); *Danzer v. Norden Systems, Inc.*, 151 F.3d 50, 55 (2d Cir. 1998)(The employee's assertion of satisfactory performance was relevant to prima facie case and pretext).

of the petitioners' failure to prove a prima facie case under *McDonnell Douglas*, the relevant issue for disposition should have been framed as whether the petitioners produced sufficient evidence to create a genuine issue of material fact as to pretext or age discrimination. How the court frames the relevant issue within the confines of the *McDonnell Douglas* burden shifting analysis is critical to the outcome, as will be discussed in more detail in the next section. Thus, it may be ineffective for this Court, in *Reeves*, to clarify the appropriate standards of proof to be applied at the pretext stage of the inferential proof analysis if lower courts are improperly framing the relevant inquiry so that cases are prematurely terminated at the prima facie stage before ever reaching the pretext inquiry. Guidance is necessary in this case, like *Reeves*, to safeguard the statutorily-enacted role of the jury in civil rights cases.

Disposal of cases as a matter of law by the courts is usually initiated by the respondent's motion for summary judgment under Rule 56. Thus, the procedural posture of this case, unlike *Reeves* and *Hicks*, is representative of the vast majority of discrimination cases that are taken away from the jury. By granting certiorari in only the extremely flawed or unique discrimination cases, such as *Reeves* and *Hicks*, this Court may make less progress unifying the federal law than if the Court reviews a case like this one, which is characteristic of many discrimination cases supported by circumstantial evidence that are summarily disposed of on summary judgment.

Although the Sixth Circuit fails to articulate what it understands its role to be in reviewing the district court's Rule 56 summary disposition, like the Fifth Circuit's Rule 50 "plenary review" in *Reeves*, the Sixth Circuit treated its review function as authorizing it to discard evidence entirely

where there was a question going to its weight. This type of review cannot be reconciled with Supreme Court precedent that teaches:

> [c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.... The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); *see also, Hunt v. Cromartie*, 526 U.S. 541, 119 S.Ct. 1545, 1552 (1999)(redistricting case cautioning against summary judgment, particularly in favor of plaintiffs, when motive is disputed).

A related issue to the Rules 50 and 56 determination that arises in both *Reeves* and this case is the failure of the Fifth and Sixth Circuits to view all of the evidence in the context of the entire record. An isolated piece of circumstantial evidence in a discrimination case will not necessarily be indicative of discriminatory animus until it is viewed in the context with other strands of circumstantial evidence. Courts must not usurp the role of the jury by considering the plaintiff's evidence solely in piecemeal fashion as was done in this case and in *Reeves*. *See, e.g.*, *Stern v. Trustees of Columbia University*, 131 F.3d 305, 313-14 (2d Cir. 1997); *Bray v. Marriott Hotels*, 110 F.3d 986, 991 (3d Cir. 1997); *Futrell v. J. I. Case*, 38 F.3d 342 (7th Cir. 1994).

Like the Fifth Circuit in *Reeves*, the Sixth Circuit weighed and disregarded the petitioners' evidence, drew

inferences in respondent's favor, and proffered innocent explanations for individual strands of evidence. For example, the Sixth Circuit completely disregards the context of the employer's decision-making process (that most of its workers were nearing retirement age), the raw statistical data showing that approximately 95% of the replacement workers were substantially younger than the petitioners (calling it "merely incidental"),[6] age-based restrictions in other jobs, and the respondent's disparate treatment of the applicant pool containing its "older" former employees compared to the applicant pool containing the "younger" community college students. The lower court refused to draw any justifiable inferences from the fact the petitioners formerly worked for the respondent and were good employees. Instead, contrary to reality, it found that the petitioners were no different than the general public.[7] (CA6 Op., App. pp. 12a-13a). The

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[6] The Sixth Circuit used the date the petitioners filed their EEOC charges as a cut off date for tabulating the ages of the new hires. There is no evidence in the record, however, establishing when the respondent knew of the petitioners' EEOC charges. Similarly, the Sixth Circuit's statistical analysis did not reflect that some of the "over forty" new hires were substantially younger than the petitioners. See *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996).

[7] Unlike the general public, the parties had a prior long term relationship, and the petitioners affirmatively sought job information from the respondent through direct contacts. Past practice between the parties included periodic negotiation and communication, even after the petitioners' preferential rehire rights expired. Rohm & Haas management informed the petitioners they would be given preferential rehire rights even if their contractual rights expired, as the company had always done for their former employees. (J.A. at pp.296-97, 311, 313). This is relevant, not to prove a legal obligation to the petitioners, but as circumstantial

lower court credited the respondent's evidence by emphasizing differences between plexiglas production and production of other chemical products; but it disregarded the petitioners' evidence demonstrating that the respondent and union treated all chemical production workers as interchangeable until 1994. Thus, the respondent's explanation that it knew in 1986 that the plexiglas workers' experience was irrelevant to its other chemical manufacturing operations is not credible. The lower court rejects entirely the petitioners' additional evidence of pretext from supporting witnesses' affidavits, and finds that the affidavits "missed the point;"were "undermined" by the respondent's proof, and "merely revealed reasonable differences in opinion." The lower court credits the respondent's irrelevant and unsupported assertion that the hiring criteria have been a complete success, saving them $870,000 in training costs at the Knoxville plant; however, it rejects as irrelevant, the fact the company has not adopted these same "successful," "cost-saving," "necessary" hiring criteria at its other chemical plants, except for the only other plant with laid off plexiglas workers. Since Rohm & Haas rejected the petitioners without any attempt to learn if either was computer literate or had other "relevant" training, a jury could reasonably infer that

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evidence of age discrimination based on the respondent's uncharacteristic treatment of the petitioners compared to prior dealings. A jury could infer that the respondent deviated from its past practice because it's workforce and the former employees had aged considerably by the time it needed to hire a new workforce. Unlike the general public, the petitioners had a known work history or track record with the respondent, and had been loyal, long-term, good workers. These facts give context to the respondent's dismissive treatment of its former employees who sought information about job availability, compared to the company's efforts to recruit applicants with unknown track records.

Rohm & Haas management did not want to consider the petitioners for rehire based on ageist stereotypes that its older former employees would not have computer skills or other updated skills.

Contrary to this Court's precedent, but similar to the Fifth Circuit's analysis in *Reeves*, the Sixth Circuit drew "counter-inferences" in respondent's favor that have no basis in fact and are of questionable legal import. The lower court suggests that Rohm & Haas does not discriminate on the basis of age because "not all of the new hires under the criteria are younger than forty years old," (CA6 Op., App. p. 12a), and the average age of former employees it "voluntarily" transferred to the Knoxville plant was fifty-two years. (CA6 Op., App. p. 3a-4a n.1). Thus, the lower court improperly infers that if some members of the protected group did not suffer discrimination then this shows a lack of motivation to discriminate against the petitioners. This Court has rejected such reasoning employed by both the Fifth Circuit in *Reeves* and the Sixth Circuit in this case.[8] Moreover, the Sixth Circuit ignored evidence that the "older" group of transferred employees was already on Rohm & Haas' payroll, and as a condition for "rehire" in Knoxville, Rohm & Haas cut these workers' wages. (J.A. at p.230). The Sixth Circuit also failed to consider the inference that because Rohm & Haas had not hired any new employees since 1979, that when it last

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[8] *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978)("[A] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination . . . . It is clear beyond cavil that the obligation imposed by Title VII is to provide equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's races are already proportionately represented in the work force.") (citations omitted).

hired employees, the average age of the new hires was under 40 years old. Instead, the Sixth Circuit drew "counter-inferences" favoring the respondent.

Thus, the issues in this case are substantially similar to the issues pending before this Court in *Reeves*. Each case presents important and fundamental standard of proof issues under *McDonnell Douglas* and its progeny when courts are determining whether to take a case away from the jury. This Court should accept this case to emphasize that summary judgment should be denied when the evidence is sufficient to create a disputed issue of material fact from which a jury may draw an inference that the employer's asserted legitimate nondiscriminatory reason is pretextual. A jury may accept or reject the further inference of discrimination, and direct evidence of discrimination is not required.

II. THE LOWER COURTS UNDERMINED THE VERY PURPOSE AND STRUCTURE OF THE INFERENTIAL PROOF METHOD BY USING THE RESPONDENT'S "NONDISCRIMINATORY REASON" AS THE PREDICATE FOR FINDING THAT THE PETITIONERS FAILED TO PROVE A PRIMA FACIE CASE OF DISCRIMINATION.

In order to reach the conclusion that the petitioners failed to prove a prima facie case of discrimination, the lower courts improperly imported the later stages of the *McDonnell Douglas* inquiry into the initial prima facie stage, by crediting in the prima facie case analysis the justification offered by Rohm & Haas as its "nondiscriminatory reason." In other words, the lower courts utilize the respondent's

nondiscriminatory explanation as the measuring stick for the "qualified" prong of the *McDonnell Douglas* prima facie case test. This analysis of the "qualified" prong set the petitioners' burden far too high, improperly accepted that the hiring criteria are a nondiscriminatory indicator of who is qualified, and prematurely terminated the petitioners' case.

By focusing on the prima facie case, the Sixth Circuit disregards this Court's precedent. This Court directs that

> [w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.'

United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715-16 (1983)(citations omitted). The Sixth Circuit states, however, that the petitioners must meet the *McDonnell Douglas* prima facie case elements in order for their case to proceed (CA6 Op., App. p.8a), and that the "qualified" prong of the test is the crux of the issue in this case. (CA6 Op., App. p.9a). The lower court then determined that the petitioners were not qualified for purposes of establishing a prima facie case because they failed to prove that they met the respondent's standards in all of the areas deemed "relevant" by Rohm & Haas in its explanation for not hiring them, such as computer familiarity, or trouble-shooting aptitude. By focusing solely on the prima facie case, and conflating the distinct stages of the *McDonnell Douglas* inquiry, the Sixth Circuit failed to heed this Court's directives, and it undermined the purpose and structure of the inferential proof

method. The Sixth Circuit's analysis in this case would bar almost any plaintiff from getting beyond the prima facie stage.

Some Courts of Appeal have recognized the formidable burden that is placed on a plaintiff when courts focus on the prima facie case, and when they fail to properly distinguish among the distinct stages of the *McDonnell Douglas* inquiry by considering the employer's nondiscriminatory reason in connection with the plaintiff's establishment of a prima facie case.[9] The Sixth Circuit has

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[9] *See, e.g., Brennan v. GTE Government Systems Corp.*, 150 F.3d 21, 27 (1st Cir. 1998)(reversed the grant of a directed verdict to the defendant stating "[s]uch an interpretation would render irrelevant the remaining burden shifting requirements (the employer's articulation of a legitimate reason would be incorporated, de facto, into the job expectation standard, and the employee's obligation to demonstrate pretext would have to be fought at the prima facie stage), and would be an `onerous' endeavor, beyond the confines of a prima facie case."); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 938-39 (3d Cir. 1997)(reversed summary judgment to the defendant in an ADA case because the district court required the plaintiff to show that he met the defendant's legitimate expectations as part of the prima facie case which introduced a subjective element better handled under a pretext analysis); *Roberts v. Separators, Inc.*, 172 F.3d 448, 451 (7th Cir. 1999)(The court recognized that the defendant's evidence of poor job performance should be analyzed in the pretext stage, and that "because this is a prima facie case with minimal burdens, the plaintiff's self-serving statements `may create a material dispute about . . . [his own] ability.'"); *Miners v. Cargill Communications, Inc.*, 113 F.3d 820, 823-24 n.6 (8th Cir. 1997) (importing the defendant's evidence of misconduct to bar the ADA plaintiff from proving "otherwise qualified" would allow even pretextual explanations to bar plaintiffs from making their prima facie case because this evidence would suffice regardless of

recently rejected the type of flawed analysis that was used to grant summary judgment in this case. *See Cline v. Catholic Diocese of Toledo*, __F.3d__, 2000 WL 272258 (6th Cir. March 14, 2000).[10]

McDonnell Douglas and its progeny describe three distinct stages to the proper inferential proof analysis. The prima facie requirement for making a discrimination claim is not meant to be "onerous," and merely serves to raise a rebuttable presumption of discrimination by eliminating the most common nondiscriminatory reasons for the adverse employment action. *Burdine*, 450 U.S. at 253-54. Thus, when assessing whether the petitioners are qualified for the positions at the prima facie stage, the lower court should have examined the petitioners' evidence independent of the nondiscriminatory reason produced by Rohm & Haas. *See Burdine*, 450 U.S. at 254.

In this case, the petitioners presented undisputed facts to establish their minimal burden of demonstrating they were qualified for purposes of meeting the *McDonnell Douglas*

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whether it prompted the adverse employment action); *Thomas v. Denny's Inc.*, 111 F.3d 1506, 1510 (10th Cir. 1997)(reversed jury verdict for the defendant recognizing that the defendant's proffered nondiscriminatory reason should not be considered in connection with the plaintiff's establishment of a prima facie case because it would short circuit the plaintiff's evidence of pretext).

[10] The opinion filed March 14, 2000 amends an earlier opinion filed on the same day the Sixth Circuit panel denied the plaintiffs' petition for panel rehearing in this case, December 28, 1999. Judge Jones, in *Cline*, details how this Court's precedent prohibits courts from conflating the distinct stages of the *McDonnell Douglas* inquiry.

prima facie case elements. The petitioners each had more than 5 years chemical plant experience working hourly production jobs for the same employer with whom they now seek employment for available hourly production jobs. The petitioners met the objective aspect of the respondent's hiring criterion requiring five years chemical plant experience. The adequacy of the qualifications is at issue only after the burden shifts to the respondent to articulate its legitimate explanation for not considering the petitioners for rehire. Rohm & Haas management interprets a subjective element of its hiring criteria to explain that the petitioners' prior chemical plant experience is not relevant because the petitioners produced plexiglas, a purportedly less complex process that did not involve computers and "trouble-shooting." Thus, the crux of the issue in this case is not the prima facie case as stated by the Sixth Circuit. Properly applying *McDonnell Douglas* and *Aikens*, the crux of the issue is whether the petitioners produced sufficient evidence to create a genuine issue of material fact from which a jury may draw an inference of pretext or age discrimination.

Establishing a uniform analysis and evidentiary burden is important because courts risk prematurely terminating a discrimination case as a matter of law when a proper *McDonnell Douglas* analysis would likely demonstrate a factual dispute to be resolved by a jury. At the pretext stage of the inquiry, plaintiffs have several avenues to make their case for discrimination, and need only produce evidence sufficient to create a disputed issue of fact as to pretext.[11]

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[11] In the Sixth Circuit, "pretext" may be shown by evidence that: 1) the stated reasons for the adverse employment action have no basis in fact; 2) the stated reasons are not the real reasons; or 3) the stated reasons are insufficient to explain the

For example, in this case, the petitioners' evidence demonstrating the relevance of their prior work experience at the respondent's Knoxville chemical plant is only one strand of circumstantial evidence to support a finding of pretext and age discrimination. Thus, if a jury believed that the petitioners had not conclusively proved that their prior work experience was relevant to the jobs at issue, the jury could still find that the respondent's rejection of the petitioners was based on impermissible age bias. A jury's finding could be based on evidence that the respondent rejected the petitioners before it ever knew whether they had relevant work experience or college degrees, coupled with the statistical data, or comparative treatment of the community college recruits, or evidence that other qualified former employees in the protected age group were also rejected. Thus, under a pretext analysis, unlike the prima facie case analysis, conclusive proof of relevant qualifications is not determinative of the ultimate issue of whether the petitioners have produced sufficient evidence from which a jury may infer pretext and age discrimination. When courts analyze a qualification dispute at the prima facie stage rather than the pretext stage, they risk intruding on the role of the jury.

The Sixth Circuit's flawed analysis importing the respondent's nondiscriminatory reason into the prima facie case inquiry also affected its decision to give no weight to the petitioners' statistical data.[12] The Sixth Circuit states that

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adverse employment action. *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382 (6th Cir. 1993).

[12] The district court never considered the petitioners' statistical data as part of their proof of disparate treatment, although it rejected the data as insufficient to prove disparate impact, a claim not pursued on appeal.

"[t]hese statistics, however, were not appropriately tailored to address the relevant labor pool, ... First, the record reveals no data concerning the ages of the relevant labor pool with the qualifications required by the hiring criteria." (CA6 Op., App. p.12a) Thus, the petitioners face the same formidable burden as discussed above because the court is accepting the respondent's hiring criteria as the nondiscriminatory parameters for determining the relevant "qualified" labor pool. Under this analysis, the Sixth Circuit has frustrated the petitioners' ability to use statistics as circumstantial evidence to support their case of intentional discrimination.

Because one of the most common nondiscriminatory reasons offered by employers when a plaintiff challenges an adverse employment action is that the plaintiff is "unqualified," or is not meeting the employer's "legitimate expectations," this case is an appropriate vehicle for providing guidance to the lower courts on this often posed dilemma of properly distinguishing among the distinct stages of the inferential proof method when these separate inquiries appear to overlap. Without guidance from this Court, the lower courts will undermine the inferential proof method and apply arbitrary standards to summarily dispose of employment discrimination cases based on circumstantial evidence. For example, lower courts exhibit some confusion as to whether "disputed" elements of the prima facie case create issues of fact to be resolved by the trier of fact, when the "dispute" arises from improperly conflating the distinct stages of the *McDonnell Douglas* inquiry.[13]

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[13] The Sixth Circuit has conflicting opinions as to whether the jury should decide the question of whether the plaintiff has established a prima facie case of discrimination. Compare *Gafford*

The *McDonnell Douglas* inferential proof framework should not be applied in a way that will stymie plaintiffs; however, this results when courts use the employer's nondiscriminatory reason as a predicate for finding that a plaintiff has failed to make a prima facie case of discrimination. Because this is a fundamental and commonly misapplied aspect of the inferential proof method of proving discrimination, this Court's guidance is important to prevent the lower courts from usurping the jury's role of determining the ultimate question of intentional discrimination.

CONCLUSION

Proper resolution of the issues in this case, together with *Reeves v. Sanderson Plumbing Products, Inc.*, No.99-

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v. General Elec. Co., 997 F.2d 150 (6th Cir. 1993) (it is not error for the district court to submit the question of whether a prima facie case had been established to the jury because the elements of the prima facie case may be disputed issues of fact which need to be resolved by a trier of fact) and *EEOC v. Avery-Dennison Corp.*, 104 F.3d 858 (6th Cir. 1997) (Judge Ryan, dissenting, notes that the majority's opinion, which states that the sufficiency of the proof as to the plaintiff's prima facie case is a question of law, contradicts the holding in *Gafford*). In *Cline v. Catholic Diocese of Toledo*, __F.3d__, 2000 WL 272258 (6th Cir. March 14, 2000), the Sixth Circuit notes that at the summary judgment stage, the plaintiff need only produce evidence sufficient to create a genuine issue of fact as to each stage of the *McDonnell Douglas* inquiry, including the prima facie stage. *See also*, *Thomas v. Denny's Inc.*, 111 F.3d 1506 (10th Cir. 1997)(reversed verdict for the defendant because district court erred in instructing the jury that the plaintiff must prove as part of his prima facie case that he was at least as well qualified as the persons hired instead of him).

536, will aid this Court in clarifying the appropriate analysis and standards of proof under *McDonnell Douglas* and its progeny. In the alternative, this Court should hold this case in abeyance until a decision is rendered in *Reeves*. Thereafter, the petitioners pray for an order granting certiorari, vacating the judgment, and remanding the case to the lower court for reconsideration in light of this Court's decision in *Reeves* and other intervening Circuit caselaw.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOT RECOMMENDED FOR PUBLICATION

[Filed Oct. 29, 1999]

No. 98-6186

Della J. BROWNING AND JAY ELEDGE, *Plaintiffs-Appellants*,	)
v.	)
ROHM & HAAS COMPANY, *Defendant-Appellee*.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

BEFORE: MERRITT and CLAY, Circuit Judges; ALDRICH, District Judge.*

* The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

MERRITT, Circuit Judge. Plaintiffs Della Browning and Jay Eledge appeal the district court's grant of summary judgement in favor of the defendant Rohm and Haas Company on their age discrimination suit brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and the Tennessee Human Rights Act, TENN.CODE ANN. § 4-21-101, *et seq.*, claiming that their rights were violated when Rohm and Haas failed to hire them under new hiring criteria for hourly workers in the company's Knoxville chemical plant. In this appeal, Browning and Eledge contend that District Judge Jordan erred in finding that they, first, failed to produce sufficient evidence to establish a prima facie case of age discrimination, and second, failed to prove that Rohm and Haas' stated reasons for adopting the new hiring criteria and not hiring Browning and Eledge were merely pretextual. For the reasons stated below, we affirm the decision below.

Plaintiff Eledge began work in 1968 at the Rohm and Haas Knoxville chemical plant, and plaintiff Browning began work at the plant in 1976, both in its plexiglas operation. The plaintiffs were hourly employees who worked primarily in the mold filling department, where Browning performed unskilled jobs and Eledge performed semi-skilled jobs. In addition to the plexiglas operation, the plant also had a separate chemical operation. The extent of the plaintiffs' tenure with Rohm and Haas, however, was confined solely to the plexiglas operation; they never worked in the chemical operation.

Due to a workforce reduction in March 1982, Browning and Eledge were laid off along with 108 other employees. At that time, the plaintiffs opted not to apply for other jobs with Rohm and Haas because they would have been

forced to give up three-year recall rights guaranteed by their collective bargaining agreement. After these initial three-year recall rights expired, Browning and Eledge were later granted preferential rehiring rights for four additional years, or until March 1989, under a new collective bargaining agreement. Despite these rights, neither of the plaintiffs, nor any other of the employees laid off in March 1982, were ever recalled or rehired by Rohm and Haas.

In addition to hiring no new employees at its Knoxville plant from March 1979 to February 1993, Browning and Eledge's former positions were abolished when Rohm and Haas permanently closed its plexiglas operation in December 1987. By 1993, however, Rohm and Haas management decided it would need to hire and train new hourly employees in anticipation of significant vacancies in its chemical operation, due to the likely retirement of several senior employees and because a less than expected number of former Knoxville employees located at other Rohm and Haas plants accepted transfer back to the Knoxville plant.[1] Prior to hiring

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[1] Prior to the implementation of the new criteria, Rohm and Haas offered positions to fifty-five former employees of the Knoxville plant who had been laid off or resigned from the plexiglas operation in 1986-87, and who had accepted employment at other Rohm and Haas chemical plants. Only thirty-one former employees accepted the offer. Despite the fact that the new hiring criteria were not yet in effect, purportedly each of these transferees had five years "relevant experience" in a chemical plant, although the record does not indicate what the transferees specific job duties were at the other chemical plants. Interestingly, the average age of these former employees was fifty-two years when they were rehired at the Knoxville plant, despite the fact that Rohm and Haas had no

these new employees, a committee was appointed by the Rohm and Haas management to expand the hiring criteria for new hourly workers, such as chemical operators. This effort was explained as a response to the increasing complexity of the chemical operation attributed to the nature of the chemical operation itself, as well as its computerization in 1987.

The hiring committee concluded that the new employees should have computer skills, a strong background in organic chemistry and mathematics, consciousness of environmental and safety concerns, and the ability to read above a twelfth-grade level. The company believed that hiring individuals with these skills would enable it to focus on production-specific training and more expeditiously produce qualified chemical operators who could trouble-shoot the process. Furthermore, these skills were seen as necessary for the full and desired performance of a chemical operator's job duties as they presently existed and were expected to evolve over the future, thereby enabling Rohm and Haas to remain competitive in an already competitive industry.

The committee recommended that Rohm and Haas adopt the following hiring policy:

> Due to the complex demands of operating a chemical plant in an increasingly competitive environment, we have established the following requirements for those applicants seeking hourly production jobs.

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legal or contractual obligation to offer them rehire at the Knoxville plant.

> An Associate Degree in Chemical and Environmental Engineering Technology from Pellissippi State (or equivalent degree from another school), or
>
> Five years relevant experience in chemical plant operations or
>
> A relevant four year degree from an accredited college or university.
>
> This policy will go into effect when the current list of former employees with rehire eligibility is exhausted.

Rohm and Haas management hoped that this new criteria would substantially increase the efficiency and productivity of the chemical operation, as well as reduce training costs. The new hiring criteria were ultimately posted at the Knoxville plant in November 1993.

The new hiring criteria went into effect for chemical operator positions in September 1994 when Rohm and Haas began hiring new employees for the Knoxville plant. When plaintiff Eledge became aware in 1996 that Rohm and Haas was hiring new employees, he sought to have the union enforce his preferential rehire rights. He was informed by the union, however, that his rights had expired and that the selection of new employees was at the discretion of Rohm and Haas under the collective bargaining agreement. In response, Eledge filed an unfair labor practice charge against the union with the NLRB, but his claim was dismissed. Eledge and Browning next filed age discrimination claims with the

EEOC, but these claims were likewise dismissed. Eventually, the plaintiffs formally applied for chemical operator positions at the Knoxville plant in late summer 1996, fourteen years after being laid-off. Their applications were subsequently rejected because Rohm and Haas hiring personnel determined that the plaintiffs' previous experience in the plexiglas operation was not "relevant experience" under the hiring criteria.

The plaintiffs filed their age discrimination claim with the district court in December 1996, claiming that they were not hired as chemical operators because of their age. The district court determined in a well-reasoned opinion that Browning and Eledge had failed to establish a *prima facie* case of intentional age discrimination under the test set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). Specifically, the district court held that the plaintiffs failed to present evidence that they were qualified under the new hiring criteria for the chemical operator position and that their prior experience in the now-defunct plexiglas operation constituted five years "relevant experience" in a chemical plant. The court noted that "[n]othing the plaintiffs did while working in the Plexiglas [sic] operation would have prepared them for chemical operators."

Furthermore, the district court rejected the plaintiffs' claim that the new hiring criteria were unnecessary and merely a pretextual barrier to hiring older workers. The court believed that Rohm and Haas had provided "overwhelming evidence" that the new hiring criteria were motivated by legitimate non-discriminatory reasons based upon the company's business judgment that it needed to hire more

qualified chemical operators, and that the plaintiffs had failed to produce any evidence that the criteria arose from age discrimination. As a result, the district court rejected the plaintiffs' claims of intentional age discrimination and granted summary judgment for Rohm and Haas.[2]

Although plaintiffs Browning and Eledge have brought age discrimination claims under both Tennessee and federal law, actions under the Tennessee Human Rights Act are analyzed under the applicable federal model because Tennessee is a deferral state. *See Jackson v. Richards Med. Co.*, 961 F.2d 575, 579 (6th Cir.1992) (citing TENN.CODE ANN. § 4-21-101, which states: "t is the purpose and intent of the general assembly by [the enactment of the Tennessee Human Rights Act] to provide for execution within Tennessee of the policies embodied in . . . the Age Discrimination of [sic] Employment Act of 1967, as amended. . . ."). Accordingly, both claims are appropriately considered together.

It is well-settled in this circuit that in an intentional age discrimination suit, the ultimate question is whether age was a determining or motivating factor in the employment decision which adversely affected the claimant. *See, e.g., Hartsel v. Keys*, 87 F.3d 795, 800 (6th Cir.1996) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981)

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[2] The district court also rejected the plaintiffs' claims that they had an entitlement to be recalled or rehired because of their prior employment with Rohm and Haas, and that they had suffered age discrimination under the disparate impact model. These claims have not been raised on appeal.

and *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). Although proof of discriminatory motive is essential, it can be inferred from differences in treatment. *See Hartsel*, 87 F.3d at 800 (citing *International Bd. of Teamsters v. United States, 431 U.S.* 324, 335 n. 15 (1977)). For the plaintiffs' case to proceed, however, they must demonstrate that they meet the requirements of the *prima facie* case, as set forth in *McDonnell Douglas*.

Generally, plaintiffs establish a *prima facie* case of intentional age discrimination in a failure to hire claim by showing that: 1) they were members of the protected age group, between forty and seventy years old; 2) that they applied and were qualified for jobs for which the employer was seeking applicants; 3) that they were rejected despite being qualified; and 4) that the position remained open and the employer continued to seek applicants with the plaintiffs' qualifications. If the plaintiffs make a *prima facie* case by meeting the four *McDonnell Douglas* requirements, the burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its decision not to hire the plaintiffs. If defendant articulates such a reason, then the burden shifts back to the plaintiffs to show that the defendant's proffered reason for discharge is pretextual. Moreover, the burden of proof always remains with the plaintiffs. Pretext is shown directly by establishing that the proffered reason is unworthy of credence, or indirectly by showing that discriminatory reasons "more likely" motivated the employer's decision.

A careful review of the record in this case reveals that the district court did not err in its application of the burden-shifting analysis set forth in *McDonnell Douglas* and

its progeny. The crux of the issue in this case is whether plaintiffs Browning and Eledge were qualified under the new hiring criteria, thereby satisfying the second prong of the *McDonnell Douglas* test and establishing a *prima facie* case of intentional age discrimination. The district court correctly held, however, that Rohm and Haas management appropriately determined in its business judgment that the plaintiffs' prior experience in its plexiglas operation did not satisfy the new hiring criteria for chemical operators.

As the district court noted, the plaintiffs' job duties while working in the plexiglas operation bear little relation to the responsibilities of a modern chemical operator. The differing nature of these jobs is clearly illustrated in several affidavits produced by the defendant, as well as a recent study conducted by the American Chemical Society of the skills required by a chemical operator. Furthermore, not only was the Rohm and Haas chemical operation always more complex than the plexiglas operation, but in the fourteen years since the plaintiffs worked for the company, the technological sophistication of the chemical operation has been significantly upgraded. In fact, the expansion of the plant's computerization continues today. Therefore, as the district court concluded, any skills plaintiffs acquired while working in the plexiglas operation fourteen years earlier did not adequately prepare them for the chemical operator position for which they applied.

The plaintiffs argue that the hiring criteria do not make specific mention of the exact skills required of a chemical operator; thus, it is unclear whether the plaintiffs truly are qualified. A brief review of the curriculum required for the Pellissippi State degree gives a clear indication of the types of

skills necessary for such a job. The curriculum includes, for example, course work in chemistry, computer programming for engineers, technical math, calculus, physics, organic chemistry, chemical engineering materials, unit operations, hazardous waste control, basic electronics, as well as English composition. In contrast, the record indicates that Browning worked only in unskilled jobs and Eledge worked only in semi-skilled jobs that did not significantly involve any of these skills.[3] Therefore, the district court accurately held that Browning and Eledge's experience in the plexiglas operation is not relevant under the hiring criteria and that they have failed to satisfy the "qualified" prong of the *McDonnell Douglas* test.

In response to the plaintiffs' claim that the new hiring criteria were merely pretextual, the district court correctly recognized that Rohm and Haas' perceived need for more highly qualified and educated chemical operators was a well-reasoned business judgment that the hiring criteria were job related in light of the rapidly evolving world of chemical operations. Accordingly, the implementation of the new hiring criteria was not a veiled effort at screening out older applicants. The district court noted that the project manager of the comprehensive American Chemical Society study concluded that the hiring criteria promulgated by the Rohm

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[3] Browning worked as an office janitor, material handler, equipment cleaner, finishing cleaning operator, and clamp applicator operator. Eledge worked as a saw helper, mold maker, plexiglas processor, office and laboratory janitor, polisher helper, mirror operator, polisher, mat handler, miscellaneous relief finisher, sheet recovery operator, assistant polymerization operator, mold line starter, and masker.

and Haas hiring committee should substantially increase the efficiency and productivity of the chemical operation, as well as reduce training costs. Furthermore, the district court referred to statements by Rohm and Haas management that the hiring criteria has thus far "been an unqualified success from both a cost and performance standpoint," citing an estimated savings of over $870,000 in training costs for employees hired under the criteria. Thus, the district court appropriately found that Rohm and Haas had legitimate reasons to implement the hiring criteria.

In an effort to rebut the defendant's proffered reasons for implementing the hiring criteria, the plaintiffs produced affidavits of several senior hourly Rohm and Haas employees who believed that skills required by the new hiring criteria were not job related, and that training of new employees hired under the criteria had not been made any easier by their increased qualifications. Instead, the affiants assert that an effective chemical operator merely required on-the-job training, and that knowledge of chemistry and math and computer skills were not necessary. Therefore, the plaintiffs conclude an inference of age discrimination should be drawn because a significantly greater number of younger persons have been hired under seemingly "unnecessary" criteria.

The district court accurately found, however, that the hiring criteria were not only neutral on their face, but that the affidavits submitted by the plaintiff "miss the point." The court noted that the affiants' limited experience training and working with the employees hired under the new criteria not only undermined the bases of their opinions, but that their statements merely revealed reasonable differences in opinion that did not raise issues of fact relevant to a summary

judgment determination. Furthermore, the district court appropriately recognized that an employer is "entitled to improve the quality of its workforce by hiring persons with more experience and/or education than has been required before, especially in a chemical plant with rapidly expanding technology." The fact that a significant number of persons with these increased qualifications hired by Rohm and Haas are younger was merely incidental. There is no evidence of any age discrimination.

Although the documents in the joint appendix contain no direct evidence of age discrimination, Browning and Eledge believe that an inference of age discrimination further arises from an examination of the context of Rohm and Haas' decision to hire younger workers and not to hire the plaintiffs. The plaintiffs presented the court with statistical data purporting to support their claim of intentional age discrimination that pertained to the ages of the employees hired under the new criteria as compared to the ages of the relevant labor pool. These statistics, however, were not appropriately tailored to address the relevant labor pool, nor did they necessarily support the plaintiffs' claims. First, the record reveals no data concerning the ages of the relevant labor pool *with the qualifications* required by the hiring criteria. Second, all of the new hires have met one of the new criteria. Finally, not all of the new hires under the criteria are younger than forty years old. It appears from the record that between the time the hiring criteria were implemented in September 1994 and July 1996 (the date the plaintiffs filed their EEOC claims), there have been forty hires "off the street" (i.e. not one of the thirty-one former Knoxville employees transferred back to the plant in 1993) with five, or 12.5 percent, over forty years old. In addition, between

September 1994 and August 1998 (the date of the district court opinion), there have been eighty-one new hires "off the street" with fourteen, or 17.28%, over forty years old. These statistics do not necessarily support a claim of age discrimination.

Furthermore, the plaintiffs argue that the evidence showed the defendant favored younger applicants because they supported the development of the Pellissippi State associate degree program and encouraged its graduates to apply for chemical operator positions. As the district court noted, however, the record fails to reveal that these efforts were based upon any bias, as opposed to a preference for a better-educated pool of applicants based upon a reasoned and thoughtful analysis of the company's personnel needs. There is no evidence that Pellissippi State graduates were given preferential treatment over applicants from the general public.[4] Furthermore, there is no indication that older students could not enroll in the Pellissippi State program, nor that older graduates of the program that applied for chemical operator positions were denied employment.[5] Therefore, the plaintiffs' argument that the statistical and other circumstantial evidence supports a finding of age discrimination is unpersuasive.

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[4] The district court correctly recognized that the plaintiffs are part of the general public since they no longer have any recall or preferential rehire rights.

[5] There is no specific information in the record concerning either the ages of students enrolled in the Pellissippi State program, or who have graduated from the program.

Finally, the plaintiffs' arguments that they were given the run-around by Rohm and Haas management, that they were not timely informed of the hiring criteria or the chemical operator openings, and that the new hiring criteria are not necessary because they are not used at other Rohm and Haas plants are similarly unpersuasive. As a result, the district court appropriately determined that Rohm and Haas' implementation of the criteria was not motivated by discriminatory motive, nor were the plaintiffs treated in a way that gives rise to an inference of intentional age discrimination.

This court has closely scrutinized the record in this case and has determined that the district court correctly held that the plaintiffs failed to establish, both, that they were qualified, and that the hiring criteria were intended as a pretextual barrier.

Accordingly, the decision of the district court is **AFFIRMED**.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

[Filed August 6, 1998]

No. 3:96-CV-1010

Della J. BROWNING and JAY ELEDGE, *Plaintiffs*,	)
v.	)
ROHM & HAAS TENNESSEE, INC., *Defendant*.	)

MEMORANDUM OPINION

This civil action is before the court on the motion of the defendant Rohm and Haas Tennessee, Inc. for summary judgment [doc. 15]. The plaintiffs have responded [doc. 23] and each party has filed extensive reply briefs [doc. 45 and 37]. Oral argument on the defendant's motion was heard on April 30, 1998; thus, the motion is ripe for the court's consideration. For the reasons stated below, the court finds the defendant's motion well-taken, and it will be granted.

In their complaint, the plaintiffs allege that the defendant violated both the Age Discrimination in Employment Act (29 U.S.C. § 621 *et seq.*) (ADEA) and the Tennessee Human Rights Act (Tenn.Code Ann. § 4-21-101 *et seq.*) by failing to hire them when they applied for positions in 1996, fourteen years after they had been laid off by the defendant during a reduction in force. The plaintiffs claim that the defendant adopted a new hiring policy which had the effect of making younger employees eligible for vacant job positions instead of the plaintiffs who were more qualified by virtue of their former employment with the defendant. The plaintiffs contend that the defendant has engaged in a pattern and practice of discrimination against older employees. The plaintiffs seek compensatory and punitive damages as well as an injunction directing the defendant to hire the plaintiffs for the positions for which they applied.

The defendant denies that age was a factor in its decision not to hire the plaintiffs. The defendant says that the plaintiffs were not hired because they had no legal or contractual right to be hired and they did not meet the hiring criteria adopted by the company. The defendant says that the hiring criteria have a manifest relationship to the duties of the jobs the plaintiffs applied for and the criteria serve the legitimate goals of the company.

STATEMENT OF FACTS

The facts in this case are largely undisputed, but any disputed facts will be noted in the following recitation. The defendant, Rohm and Haas Tennessee, Inc., is a Delaware corporation with a plant in Knoxville, Tennessee, that manufactures emulsions and low molecular weight polymers.

For many years, the Knoxville plant had two separate operations, the Plexiglas operation and the chemical operation. There were five separate departments in the Plexiglas operation (mold filling, special products, mold assembly, shipping, and finishing). The Plexiglas operation was highly mechanized with little or no computerization. *See* Affidavit of Ray Clift, attached to doc. 16. Most of the work involved manual or hands-on operations, including placing "spacer" on glass molds by hand; inserting "mold clamps" into a clamp applicator machine by hand; filling completed molds by hand; lifting Plexiglas sheets from conveyer lines and placing them on frames for transport; operating large table saws; constructing shipping boxes; and filling and packaging boxes by hand. The training period for new workers in the Plexiglas operation was anywhere from one to thirty days.

The second operation, and the only division still in existence at the Knoxville plant, is the chemical operation which manufactures emulsions and low molecular weight polymers used in paints, textiles, water treatment, and detergents. The chemical operation was always completely separate from the Plexiglas operation and more complex, and the training period for chemical operation workers was longer. When the chemical operation was computerized in 1987, it became even more complex than it had been in the past.

The plaintiff, Della Browning, began working for Rohm and Haas in the Knoxville Plexiglas operation in June 1976. She was an hourly employee who worked unskilled

jobs, primarily in the mold filling department.[1] She worked there until March 1982 when she was laid off, along with 108 other employees, due to a reduction in force.

The plaintiff, Jay Eledge, began working for Rohm and Haas in the Knoxville Plexiglas operation in November 1969. Eledge was also an hourly employee but he worked semi-skilled jobs, primarily in the mold filling department.[2] Eledge also was laid off in March 1982. Neither of the plaintiffs worked in the chemical operation during the time they were employed by Rohm and Haas. At the time of their lay-off, both plaintiffs had the option of applying for other jobs at the Knoxville plant or at other Rohm and Haas plants,

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[1] In her deposition, Browning described her job as follows: "I didn't work on the chemical side, but I worked in mold filling, which was worse chemicals, and I had to do all of the cleanups and dispose of the chemical waste. . . . I was around chemicals the whole time I was in mold filling." Her personnel record shows that she worked as an office janitor, a material handler, equipment cleaner, a finishing cleaning operator, and a clamp applicator operator - all unskilled positions.

[2] In his deposition, Eledge described his job as follows: "Well, when I worked down there [the Plexiglas operation], I was in several departments. I worked in the stock cutting department, the shipping department, PD department, in the lab. They had some temporary jobs in shipping/receiving or receiving and part-time or temporary jobs in the yard. . . ." His personnel file shows that he worked as a saw helper, a mold maker, Plexiglas processor, office and laboratory janitor, polisher helper, mirror operator, polisher, mat handler, miscellaneous relief finisher, sheet recovery operator, assistant polymerization operator, mold line starter, and masker.

but neither pursued this option. In order to pursue this second option, the plaintiffs say they would have had to resign and lose their recall rights.

Under their collective bargaining agreement, Browning and Eledge had recall rights for three years after their lay-off. They were not recalled during this time, and Rohm and Haas notified them that their recall rights had expired. Under new collective bargaining agreements, the 1982 laid-off employees, including Browning and Eledge, had preferential rehiring rights for two successive two year terms, or until March 1989.[3] Neither of the plaintiffs, nor any other laid-off employees, were recalled during this time period.

In December 1987, Rohm and Haas permanently closed the Plexiglas operation, and the plaintiffs' positions were abolished. Senior Plexiglas operation employees were transferred in groups of ten to the chemical operation and trained as chemical operators. Less senior chemical operators were transferred to the Plexiglas operation and ultimately laid off in December 1987. A total of sixty-nine employees with less seniority were laid off with the same three- year recall rights and two successive preferential rehiring rights agreements as those employees who were laid off in 1982. Some of the 1987 laid off employees were recalled or rehired,

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[3] According to the affidavit of Charles A. Clark, recall rights and preferential rehiring rights are different because employees with recall rights retain a portion of their benefits seniority for the period they are laid off, while those employees with preferential rehiring rights do not. *See* Affidavit of Charles A. Clark, attached to doc. 16.

some resigned and went to another Rohm and Haas plant, some refused recall or rehire, and some retired.

From March 1979 to February 1993, Rohm and Haas hired no new employees at the Knoxville plant. In the early 1990's, Rohm and Haas became concerned that senior employees who would be retiring in the near future would leave significant vacancies in the chemical operation. Rohm and Haas decided to begin to hire and train new employees in anticipation of these vacancies. In his affidavit, Ray Clift, says the company believed that the chemical operation had become so complex, partially because of the decision to computerize the operation and partially because of the nature of the operation itself, that the hiring criteria for these newly hired employees needed to be expanded. A hiring committee studied the problem and determined that the new employees should have computer skills, a strong background in organic chemistry and mathematics, consciousness of environmental and safety concerns, and the ability to read and write above a twelfth grade level. Clift says in his affidavit that: "With these skills as a prerequisite, the Company could concentrate on production unit specific training and thereby have a fully qualified chemical operator in an acceptable time frame who possessed the knowledge of math and chemistry necessary to trouble-shoot the process." Based on these requirements, the hiring committee recommended that Rohm and Haas adopt the following hiring policy:

> Due to the complex demands of operating a chemical plant in an increasingly competitive environment, we have established the following requirements for those applicants seeking hourly production jobs.

> An Associate Degree in Chemical and Environmental Engineering Technology from Pellissippi State (or equivalent degree from another school), or
>
> Five years of relevant experience in chemical plant operations or
>
> A relevant four year degree from an accredited college or university.
>
> This policy will go into effect when the current list of former employees with rehire eligibility is exhausted.

It is Clift's opinion that the hiring criteria are job related; that is, there is a strong correlation between the criteria and the job duties of a chemical operator. Clift believes that the use of these hiring criteria should substantially increase the efficiency and productivity of the chemical operations and reduce training costs. Clift denies that the hiring committee considered pension eligibility, age, race, or gender in recommending the hiring criteria.

This view is supported by the affidavit of Kenneth Chapman. Chapman is employed by the American Chemical Society (ACS) as head of Technician Resources/Education. In about 1993, the United States Department of Education awarded the ACS a grant to study chemical technician skills nationwide. Chapman managed the project which involved a comprehensive study of the skills required for Chemical Process Technicians (chemical operators). According to Chapman, the study concluded:

> To meet the demands of government regulations and automation during the 1990's, Chemical Operators have experienced a particularly rapid increase in the requirements of computer, communications, scientific, and technical knowledge and skills that must be reflected in increased knowledge and skills that new workers must bring to the workplace. . . . [T]he chemical process industry faces a particularly critical need for entry level operators who have much better knowledge and skills than their predecessors, particularly in the areas of science, math and computers. . . . [E]ntry level Chemical Operators are expected to have attained performance-based skill standards in the areas of mathematics, statistics, computer literacy skills, communication skills and workplace skills, and general plant skills. . . . Trends uncovered by the DOE study show that as Chemical Operator jobs have become more technical and complex, chemical companies are no longer able to take employees with little or no formal training and train them in math and science on-the-job.

Chapman opined that Rohm and Haas' hiring criteria are "job related and consistent with business necessity in that the criteria have a manifest relationship to the Chemical Operators' employment and substantially promote the proficient operation of Rohm and Haas' business."

The hiring criteria have been used by Rohm and Haas since September 1994. Clift states that the use of the hiring criteria has "been an unqualified success from both a cost and performance standpoint." For example, the training process for the employees who moved from the Plexiglas operation to the chemical operation in 1986 required from six to twelve months, depending on the individual. In 1994, the training process for new employees who met one or more of the criteria was only three to six months, resulting in an estimated savings of $872,256 in training costs for the employees hired under the criteria.

The plaintiff disputes that the hiring criteria are necessary or related to the jobs for which they applied. In support of their position, the plaintiffs have submitted the affidavits of Fred D. Wyrick (Exh. 3 to doc. 23), David McGill (Exh. A to doc. 37), Tommy Steele (Exh. B to doc. 37), and Joe Cronan (Exh. C to doc. 37). Fred Wyrick worked as an hourly employee at the Knoxville Rohm and Haas plant from 1962 until his retirement in October 1996. He worked at the Plexiglas operation until 1971 but successfully bid on a job in chemical operations at that time. Wyrick states that he received on-the-job training for every job he did in chemical operations. In 1989, Wyrick was asked to help develop training material for chemical operators in the polymers department because he was the oldest experienced chemical operator working in polymers at the time. Wyrick developed instructions for setting up, loading, operating, transferring, and sampling on the various chemical units, and then developed tests and evaluations to verify the trainees' level of knowledge. He states that there is no mention of chemistry or math in any of the training materials

he developed, nor do any of the tests and evaluations ask questions related to these two subjects.

Wyrick states that in the early 1990's the chemical operators had to manually input product parameters for each different product into the computers, and there was a possibility of operator error in this process. Subsequently, Rohm and Haas decided to put a "recipe" for each product into the computer, so now the chemical operators need only "interface" with the computer and acknowledge prompts to verify. This process has reduced operator error to almost zero.

Wyrick says that the training of the employees who transferred from the Plexiglas operation in 1987 was difficult and had to be extended because many of these trainees did not want to transfer but would lose their jobs otherwise, and the trainers were often training their own replacements. Interestingly, Wyrick also says that the period for training had to be extended because of the age of the trainees (in their mid-fifties). *See* Affidavit of Fred Wyrick, ¶ 27. Of these trainees, Wyrick trained five in "pumping."

It is Wyrick's opinion that any skills chemical operators need are acquired after they are hired, either through classroom or on-the-job training. He further believes that competency in chemistry and math is not necessary. Wyrick states that he has trained sixty-five newly hired operators since 1994, and these new employees who met the

criteria did not learn any faster than those who did not meet the criteria.[4]

In accord with Wyrick's opinion are David McGill, Tommy Steele, and Joe Cronan. McGill was involved with some on-the-job training in the polymers department. He believes that it was harder to train the new employees who met the criteria but who had never worked for Rohm and Haas before than to train former Rohm and Haas employees. He also believes that knowledge of chemistry and math and computer skills are not necessary to be a chemical operator.

Steele believes that the job of a chemical operator is easier today than it was in the early 1990's. He says that the educational level of the employees does not matter because Rohm and Haas trains all new employees once they are hired. Cronan agrees with this opinion.

Rohm and Haas submitted a second affidavit of Ray Clift [attached to doc. 45], in which he says that Wyrick trained no more than five employees hired under the new hiring criteria because nearly all the employees hired or recalled since 1993 were assigned to emulsions. Two of these five had prior chemical plant experience and three had the necessary associate degrees from Pellissippi State. All other employees whom Wyrick would have trained in polymers had

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[4] In his second affidavit, David A. Boatman [attached to doc. 45] says that the company's records show that only twenty-five persons, rather than sixty-five, bid into or were transferred into polymers from June 1992 to Wyrick's retirement in 1996, so Wyrick could not have trained sixty-five employees as claimed.

prior training and experience in emulsions. Clift says that hourly-employed trainers such as Wyrick were not qualified to teach the more technical subjects such as chemistry and statistics, so it is not surprising that he did not train chemical operators in these subjects.

Between March 1, 1993, and January 10, 1994, Rohm and Haas hired thirty-one chemical operators from other Rohm and Haas chemical plants.[5] These employees had either resigned in 1986-87 or were laid off from the Knoxville Plexiglas operation in 1987 and had accepted employment in chemical operations at Louisville, Kentucky, Houston, Texas, or Bristol, Pennsylvania. Although the hiring criteria were not in effect at that time, each of these thirty-one employees met the hiring criteria in that they each had five years relevant experience in a chemical plant. The average age of these employees was fifty-two at the time they were hired in 1993-94.

It is undisputed that all employees hired since September 1994 when the hiring criteria came into effect meet one or more of the criteria. It is also undisputed that some persons who applied for jobs and who appear to have met the criteria were not hired.[6] Between March 1, 1993, and July 1,

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[5] Rohm and Haas offered positions to fifty-five former Knoxville employees, but only thirty-one accepted the offer.

[6] Several former employees have submitted affidavits setting out their qualifications and claiming that they met the criteria but were not hired by Rohm and Haas [attached to doc. 23]. Of these former employees, only Robert H. Elwood arguably meets the criteria, but Boatman says in his second affidavit that

1996 (the date Browning and Eledge filed their EEOC discrimination claim), seventy- two employees were hired into hourly-paid positions, seventy-one as chemical operators. Fifty-two percent of these employees were forty years of age or older.[7] As of June 1997, 208 persons were employed in hourly-paid bargaining positions at the Knoxville plant, seventy-two percent of whom are over forty years of age, with the average age being forty-nine.

The plaintiffs argue that there were only sixty-one "new hires"; that is, new employees hired "off the street," from September 1994 to December 1996, and only four of these "new hires" were over the age of forty. The plaintiffs evidently have chosen December 1996 as a cut-off to compile their statistics because that is when this civil action was filed. Nevertheless, in its reply brief, Rohm and Haas says that the plaintiffs' figures are incorrect; that eighty-one employees have been hired under the new criteria since September 1994;

Elwood was not hired due to performance problems during his prior employment. Another former employee, John Joseph Chumlea, applied for a millwright position which must be filled per the collective bargaining agreement's internal bidding procedures. The others, Paul Michael McClain, Gary Lynn White, Fate Nix, Daniel Butler, and Chris Van Connaster, did not meet the hiring criteria in the opinion of Rohm and Haas. Their experience or degrees (in the case of Connaster) were not relevant chemical experience.

[7] This includes the thirty-one employees who transferred back to the Knoxville plant and who were all over the age of forty.

and that fourteen of them were over the age of forty when they were hired.[8]

On July 1, 1996, Browning and Eledge filed EEOC complaints. At the time, neither plaintiff had applied for a position with Rohm & Haas, but on July 8, 1996, Browning submitted an unsigned application for employment as a chemical operator, and on September 17, 1996, Eledge also submitted an application for employment. Both plaintiffs were denied employment because Rohm and Haas believed the plaintiffs did not meet the hiring criteria.

LEGAL DISCUSSION

Under Rule 56 of the Federal Rules of Civil Procedure, a motion for summary judgment may be granted, "if the pleadings, depositions, answers to interrogatories and admissions of file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The Sixth Circuit has expressly adopted a trilogy of United States Supreme Court cases which clarified the standards for summary judgment under Rule 56. *See Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir.1989) (adopting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); and *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538

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[8] It is not clear from the defendant's reply brief what date the company is using as a cut-off.

(1986)). In summary, these cases hold that in order for a non-moving party to defeat a motion for summary judgment, the non-moving party must come forward with persuasive evidence to support his or her claim that there is a genuine factual dispute; that is, the non-moving party must produce evidence on which the jury could reasonably find for the non-moving party. "The 'mere possibility' of a factual dispute is not enough." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir.1992) (quoting *Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 863 (6th Cir.1986)). "[T]his standard requires a court to make a preliminary assessment of the evidence, in order to decide whether the plaintiff's evidence concerns a material issue and is more than *de minimus*." *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir.1996), *cert. denied*, --- U.S. ----, 117 S.Ct. 683, 136 L.Ed.2d 608 (1997).

Although the plaintiffs' claims are brought under both the ADEA and the Tennessee Human Rights Act, the Tennessee courts have made it clear that Tennessee Human Rights Act actions are to be analyzed using the case law the federal courts have developed in applying corresponding federal discrimination statutes. *See Silpacharin v. Metropolitan Government of Nashville and Davidson County*, 797 S.W.2d 625, 629 (Tenn.Ct.App.1990); *Bruce v. Western Auto Supply Co.*, 669 S.W.2d 95, 97 (Tenn.Ct.App.1984). Thus, the plaintiffs' claims and the defendant's motion for summary judgment will be considered without distinction between the ADEA and the Tennessee Human Rights Act.

A. Plaintiffs' Legal or Contractual Right to Be Rehired

As a preliminary matter, the court needs to consider whether the plaintiffs had any entitlement to be recalled or

rehired because of their prior employment with Rohm and Haas. In their affidavits attached to their response to the motion for summary judgment, Browning and Eledge say that they were told that they would be given a priority for rehiring even if their recall rights had expired; thus, they imply that they had a right to be rehired before Rohm and Haas hired any new employees "off the street." Both plaintiffs say that they had been laid off prior to 1982 but were recalled, and expected that they would be recalled again after their 1982 lay off. They say that Rohm and Haas never notified them in 1993 when the company started to accept applications for chemical operators. At oral argument, counsel for the plaintiffs said that Rohm and Haas "led them to believe" that they would rehired because they were told to keep their addresses current in the personnel office. Rohm and Haas denies that the plaintiffs were told that they would be given indefinite priority for jobs after their recall rights had expired.

"Seniority rights [providing for recall or rehiring preferences] are not inherent in an employee-employer relationship, but rather, exist only to the extent that they are created by contract." *N.L.R.B. v. District 23, United Mine Workers of America*, 921 F.2d 645, 649 (6th Cir.1990). In the present case, it is undisputed that the plaintiffs' contractual rights to be recalled or rehired under various collective bargaining agreements expired on March 1, 1989, seven years after their lay off. The court finds that once these contractual rights expired, the plaintiffs "were situated no differently from the general public as far as hiring decisions were concerned," and Rohm and Haas was under no legal or contractual obligation to rehire them. *See Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 873 (6th Cir.1990). The plaintiffs appear to concede this in their response: "Plaintiffs in this

case and the companion cases would be in the same position as these new hires since plaintiffs no longer worked at Rohm and Haas and their recall rights had expired." [*See* doc. 23, at p. 21]. The fact that the plaintiffs may have been told to keep their addresses current with the company does not create any duty on the part of the company to rehire the plaintiffs once their recall/rehire rights created by the collective bargaining agreement had expired.

The court finds that the plaintiffs' prior employment with Rohm and Haas is only relevant insofar as it might relate to the plaintiffs' prior work experience, and their status with Rohm and Haas was no different than that of any other member of the public. The plaintiffs had no special entitlement to be informed of future job openings, of the implementation of hiring criteria, or of scholarships to Pellissippi State. *C.f. Wanger v. G.A. Gray Co.*, 872 F.2d 142, 146 (6th Cir.1989) (where employer and former employee are "strangers" employer not obligated to consider former employee for rehire).

B. Plaintiffs' Disparate Treatment Claim

In its motion for summary judgment, the defendant first argues that the plaintiffs' claims are insufficient to make out a claim for disparate treatment under the ADEA. "Liability in a disparate treatment case depends on whether the protected trait actually motivated the employer's decision. . . . 'Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.'" *Hartsel v. Keys*, 87 F.3d 795, 800 (6th Cir.1996), *cert. denied*, 117 S.Ct. 683 (1997) (quoting *International Bhd. of Teamsters v. United States*, 43'

U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977)). In order to show that age was the motivating factor in the defendant's decision not to hire the plaintiffs as chemical operators, the plaintiffs may present direct evidence of the defendant's improper motive or present evidence from which the trier of fact could infer the defendant's improper motive. *See Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1081 (6th Cir.1994).

In the present case, the plaintiffs have not presented the court with any direct evidence that the defendant did not hire them as chemical operators because of their age. The hiring criteria are "age neutral" on their face,[9] and the undisputed proof is that all persons hired since the criteria were adopted (and even before, if one considers the transferees from the defendant's other chemical plants) met one or more of the criteria.

Therefore, the plaintiff must present evidence from which a jury could infer that the defendant failed to hire the plaintiffs because of their age. Under this last method, the courts have traditionally modified and employed the analysis articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) to test the sufficiency of the plaintiffs' evidence. *See Hartsel*, 87 F.3d at 795; *Manzer*, 29 F.3d at 1081.

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[9] In their reply brief, the plaintiffs claim that the hiring policy adopted by the defendant was not age neutral, but without any explanation for the basis of such a claim. *See* doc. 37, pp. 8-9.

To establish a *prima facie* case of age discrimination under the *McDonnell Douglas* test, the plaintiffs must introduce evidence that (1) they are members of a protected class; (2) they applied for and were qualified for jobs with the defendant company; (3) they were not hired; and (4) the defendant company continued to seek applicants with the plaintiffs' qualifications. *See Wooden v. Board of Educ. of Jefferson County*, 931 F.2d 376, 378 (6th Cir.1991). "This proof 'in effect creates a presumption that the employer unlawfully discriminated against the employee.'" *Manzer*, 29 F.3d at 1081 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981)). The plaintiff bears the burden of production and persuasion on all four of the elements, and if all four elements have been proven, then a presumption of age discrimination arises. *See McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1160 (6th Cir.1990). If the plaintiffs succeed in proving their *prima facie* case, then the burden of production shifts to the defendant employer to articulate a legitimate, non-discriminatory reason for not hiring the plaintiffs. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; *Manzer*, 29 F.3d at 1082; *Wooden*, 931 F.2d at 378. Should the defendant employer carry this burden of production, the plaintiffs "must produce sufficient evidence from which the jury may reasonably reject the employer's explanation." *Manzer*, 29 F.3d at 1083.

Even assuming that the plaintiffs in this case can establish the first and third of their *prima facie* case, the defendants argue that the plaintiffs cannot establish the second element – that they were qualified for the positions they sought. Since this is also the defendant's legitimate, non-discriminatory reason for failing to hire the plaintiffs, the

issue of whether the plaintiffs have proven a *prima facie* case and whether the defendant's explanation was pretextual will necessitate only one discussion. It is undisputed that Rohm and Haas has only hired chemical operators who meet one or more of the hiring criteria, so the plaintiffs cannot establish the fourth element of their *prima facie* case, either.

1. Were Plaintiffs Qualified for the Positions They Sought?

The plaintiffs make two arguments on this issue: (1) that their prior experience in the Plexiglas operation satisfies the hiring criteria and (2) in any event, the hiring criteria are a sham because chemical operators do not need the skills listed in the hiring criteria. First, the plaintiffs argue that they are qualified for jobs as chemical operators because of their prior work experience in the Plexiglas operation. The plaintiffs say they handled chemicals while working in the Plexiglas operation and, in any event, Rohm and Haas is a chemical plant and so they have more than five years' experience in a chemical plant. It is the opinion of management of Rohm and Haas that the plaintiffs' time in the Plexiglas operation was not relevant experience, even if they did handle chemicals.

Initially, it should be noted that no issue of fact is created by an applicant's perception that he or she is qualified for a particular position contrary to the company's belief that the applicant is not qualified, as long as the company's belief is not improperly motivated. *See Wrenn v. Gould*, 808 F.2d 493, 502 (6th Cir.1987), *cert. denied*, 484 U.S. 1067, 108 S.Ct. 1032, 98 L.Ed.2d 996 (1988) (in the context of a Title VII case, court looks to the employer's motivation, not the applicant's perceptions, or even an objective assessment, of

what qualifications are required for a particular position); *Grauer v. Federal Express Corp.*, 894 F.Supp. 330, 334 (W.D.Tenn.1994), *aff'd* 73 F.3d 361 (6th Cir.1996) (no issue of fact created by plaintiff's subjective belief that she was more qualified than another applicant). As the Sixth Circuit said in *Wrenn*, it is the employer's motivation and intent that is at issue, not its business judgment. *Wrenn*, 808 F.2d at 502; *see also Grauer*, 894 F.Supp. at 334 (employee's subjective belief is a mere disagreement with the corporation's business judgment, and does not create an issue of fact).

In his affidavit, Ray Clift describes the work in the Plexiglas operation as follows:

> [I]t was a highly mechanized process with little or no computerization. The work was manual in nature and the approximately 250 employees worked in processes that required mostly hands-on operations such as placing "spacer" on glass molds by hand, inserting "mold clamps" into a clamp applicator machine by hand, filling completed molds by hand, lifting Plexiglas sheet from conveyer lines and placing them on "L" frames for manual transport, manually operating large table saws to cut sheet to size, constructing shipping boxes, filling and packaging boxes by hand. Other operations required the use of forklifts and other manually operated transport equipment. . . . The needed skills involved developing the production line routing and the speed necessary to keep pace with the mechanized production line producing

> approximately 1600 sheets of Plexiglas each shift or one Plexiglas sheet each 15 seconds. The education level required was high school level or less. . . .

A review of the plaintiffs' respective work experience in the Plexiglas operation reflects the type of work described by Clift. Browning primarily worked cleaning up and disposing of chemicals in the mold filling department. Eledge worked in shipping, stock cutting, mold making, polishing, and other such jobs.

Clift says that the chemical operation was always more complex than the Plexiglas operation and more training of employees was required. Clift describes the job of a chemical operator as follows:

> Since 1987 the typical employee in the Chemical Area must have the knowledge and skill to work with computers to operate large chemical reactors and other large chemical vessels. . . . From a computer console using up to 30 computer generated process control schematics (Computer screens), the operator via the keyboard produces thousands of pounds of chemical product totally unseen. The employee can be called on to operate up to five different polymerization reactors, many using a different computer control systems [sic]. . . . Knowledge of the computerized equipment, operation of computers and computerized controls and being able to follow several hundred standard operating and work

> procedures is critical to the safety, quality and productivity of the process. Being able to control the chemical reaction and trouble-shooting the production process is vital. Standard Operating Procedures must be used to communicate the instructions and the relevant percentages, weights, pound, pH, viscosity's quality sampling, etc.

The need for a chemical operator to have computer and other advanced skills is reinforced by Ronald A. Lehman, the Area Manager of the Polymers Department at the Knoxville plant and the Worldwide Manufacturing Manager for the Formulation Chemicals business unit of Rohm and Haas. He says, "Now it is virtually impossible to work in a chemical operator's job without being adept and knowledgeable in computers. . . . [O]perators must be able to work, troubleshoot, and problem solve, independently, with a minimum of supervision." *See* Affidavit of Ronald A. Lehman, attached to doc. 16. Lehman goes on to describe the particular processes and operations in both the emulsions and polymers departments that require a basic knowledge of organic chemistry and mathematics. He says that the goal of the Knoxville plant is to have a self- regulated work team with an ability to understand and adapt to mathematical and chemical variables that occur daily.

The court finds that there is no genuine issue of material fact that the plaintiffs' prior work experience in the Plexiglas operation is not "relevant" experience in a chemical

plant for purposes of satisfying one of the hiring criteria.[10] Nothing the plaintiffs did while working in the Plexiglas operation would have prepared them to be chemical operators. This conclusion is supported by another statement found in Clift's affidavit. Clift points out that in 1987 when the senior Plexiglas operation employees were transferred to the chemical operation, the initial training period for the groups of employees was two months. This was not sufficient time to train these employees in anything more than a narrow segment of the work, *i.e.*, pumping. Clift says, "It was evident that work experience in Plexiglas of whatever duration was not relevant to the work in chemical operations and did not prepare the employee for work in chemical operations."

2. Are the Hiring Criteria a Pretext for Age Discrimination?

The plaintiffs' second argument is that the hiring criteria are a pretextual barrier to hiring older workers because they are not necessary; everyone who is hired has to undergo training. The plaintiffs argue that Rohm and Haas adopted the hiring criteria to avoid hiring older persons who would be eligible to draw pension and retirement benefits. The defendant contends that there is no issue of fact that the hiring criteria were not adopted for impermissible reasons (*e.g.*, to hide an intent not to hire older persons), but, in fact, are related to the job performance of chemical operators and

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[10] Whether knowledge of chemistry, mathematics, and computer skills are reasonable requirements of a chemical operator's job will be discussed in the next section of the court's opinion. What is important at this point is that it is undisputed that neither plaintiff has these skills.

promote the proficient operation of the business. The defendant says that the plaintiffs should not be allowed to question its business decision to increase the skill level of its work force.

To reiterate, the issue in a disparate treatment case is whether age motivated the employer's decision. An age discrimination claim cannot proceed unless the employee's age actually played a role in the employer's decision-making process and had a determinative influence on the outcome. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 1706, 123 L.Ed.2d 338 (1993). A plaintiff has not met his or her burden of showing a genuine issue of material fact on the issue of pretext merely by casting doubt on the employer's legitimate reasons for its business decisions. *See Irvin v. Airco Carbide*, 837 F.2d 724, 726 (6th Cir.1987); *see also Wilkins v. Eaton Corp.*, 790 F.2d 515, 521 (6th Cir.1986) (the focus is not on the soundness of the employer's business judgment). However, just because an employer offers a business judgment rationale does not mean that the employer will prevail on a motion for summary judgment. *Hartsel v. Keys*, 87 F.3d at 800.

In the present case, however, Rohm and Haas has supplied the court with overwhelming evidence that the hiring criteria were adopted for the purpose of increasing the skill level of its chemical operators. A committee was formed to investigate the company's needs, and the committee determined that if potential employees met certain hiring criteria, the company's workforce could keep the company competitive in the market. The plaintiffs have not provided the court with a single bit of evidence that the hiring committee's work and the company's adoption of the

committee's recommendation were motivated by a desire to avoid hiring older workers.

Instead, the plaintiffs ask the court to find that there is an issue of fact concerning whether the hiring criteria are at all related to the job of chemical operator. In support of this argument, the plaintiffs rely on the affidavits of several hourly employees who believe that knowledge of chemistry, math, and computers is not necessary because the chemical operator's job is easier today than it was just a few years ago.[11] Wyrick, McGill, Steele, and Cronan all state that it is their opinion that on-the-job training and a manual is all that is required to be a chemical operator.

The court finds the recent Sixth Circuit opinion in *Hartsel* instructive on this issue. In *Hartsel*, the plaintiff had been denied a promotion to Superintendent of the Utilities Department. She had been the Acting Superintendent for over half a year. The defendants claimed that the plaintiff was not promoted because she lacked the computer skills "necessary to assist in the upgrade of computers in the Public Utilities Department." *Hartsel*, 87 F.3d at 799. There was evidence before the court that the City had purchased an expensive and complex computer and that the computer system was in use. A younger man with the necessary computer skills was hired as Superintendent.

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[11] Interestingly, the reason given for believing that the chemical operator's job is easier today is because it has been computerized. Of course, at the time the hiring criteria were adopted, the "recipes" were not being used to set up the chemical processes, and there were operator errors.

Hartsel complained that the defendants discriminated against her because of her age and sex. *Id.* at 797. Several of her co-workers supplied affidavits to the court which were to the effect that the plaintiff should have been promoted because she did a good job. One co-worker stated that she believed that it was not necessary to appoint someone with a data processing background. Concerning these affidavits, the Sixth Circuit stated:

> these affidavits miss the point. . . . The law does not require employers to make perfect decisions that others may disagree with. Rather, employers may not hire, fire, or promote for impermissible, discriminatory reasons. These affidavits reveal perhaps a reasonable difference in opinion, but their bald assertions and conclusory statements fail to provide any factual support for Hartsel's claim of sexist, ageist, or politically retaliatory animus.

Id. at 801.

The court finds that the affidavits in this case likewise miss the point. Wyrick's perception that training is all that is needed is based on his experience training employees who, with the exception of five 1987 transfers from Plexiglas to the chemical operation, either met the criteria or had been extensively trained in emulsions prior to transferring to polymers. The five 1987 transfers were trained only in one phase of a chemical operator's job, pumping, and by Wyrick's own admission, it was difficult to train for this one task because the employees did not want to be there and because

of their age. Thus, Wyrick has no well-founded basis for his opinion that there is no difference in the training of new employees who meet the hiring criteria versus those who do not. Further, Wyrick did not train in the complicated areas of chemistry and statistics because he was not qualified to do so. The affidavits of McGill, Steele and Cronan, like the affidavits in *Hartsel*, reveal no more than a reasonable difference in opinion, not an issue of fact making summary judgment inappropriate.

In any event, the evidence before the court supports Rohm and Haas' use of the hiring criteria. Any employer is entitled to improve the quality of its workforce by hiring persons with more experience and/or education than had been required before, especially in a chemical plant with rapidly expanding technology. In the opinion of Rohm and Haas, this policy has already paid off in reduced costs of training new employees.

As to the plaintiffs' argument that the defendant adopted the hiring criteria to avoid hiring older workers who would soon qualify for pension and retirement benefits, the Supreme Court, in *Hazen Paper*, made it clear that even if the employer is motivated by factors that are correlated with age, such as pension or retirement status, this does not mean that the employer has violated the ADEA. *Hazen Paper*, 507 U.S. at 613, 113 S.Ct. at 1707-08. The Court found that the problem of inaccurate and stigmatizing stereotypes related to age disappears when the employer's action is motivated by factors other than age. *Id.* at 611, 113 S.Ct. at 1706. Thus, the plaintiffs' suggestion that the adoption of the hiring criteria was to avoid having to pay older workers' pension and retirement benefits is to no avail. The plaintiffs have failed to

present the court with any evidence that age, with its inaccurate and stigmatizing stereotypes, played any part in Rohm and Haas' decision to implement the hiring criteria.

The plaintiffs believe that it is somehow relevant that other Rohm and Haas chemical plants have not adopted and implemented hiring criteria like the Knoxville plant. The plaintiffs believe it particularly telling that the Houston plant does not use such criteria, although the Louisville plant does use them. The court cannot understand the relevance of this fact. Surely an employer with several different plants is not required to have uniform hiring policies among the plants. A lack of such uniformity among different plants cannot give rise to an inference of an impermissible hiring policy.

C. Disparate Impact

Next, the defendant argues that the plaintiffs cannot make out a case of disparate impact. The defendant says that a disparate impact analysis is not applicable to ADEA cases, and even if it is, the plaintiffs cannot show that the defendant's hiring criteria have an impermissible disparate impact on older employees. The plaintiff argues that disparate impact is a cognizable theory under the ADEA in the Sixth Circuit and that the defendant cannot show that its hiring criteria are a business necessity.

1. Does Disparate Impact Liability Apply to ADEA cases?[12]

Disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate impact theory." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609, 113 S.Ct. 1701, 1705, 123 L.Ed.2d 338 (1993) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)). The only issue before the United States Supreme Court in *Hazen Paper*, was the plaintiff's disparate treatment claim under the ADEA. However, the Supreme Court stated, albeit *in dicta*, that it had never decided "whether a disparate impact theory of liability is available under the ADEA . . . ." *Hazen Paper*, 507 U.S. at 610, 113 S.Ct. at 1706. In his concurring opinion, Justice Kennedy remarked, "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory of Title VII of the Civil Rights Act of 1964 . . . [T]here are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." *Id.* at 618, 113 S.Ct. at 1710 (Kennedy, J., concurring).

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[12] The American Association of Retired Persons (AARP) has filed a brief in support of the plaintiffs' position on the issue of whether a disparate impact theory of liability is available under the ADEA. *See* doc. 54.

Primarily because of the Supreme Court's language in *Hazen Paper*, several circuit courts of appeal have determined or strongly intimated that disparate impact liability does not attach in an ADEA case. *See DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732-34 (3d Cir.1995), *cert. denied*, 516 U.S. 916, 116 S.Ct. 306, 133 L.Ed.2d 210 (1995) (strongly intimating that there is no disparate impact liability under the ADEA), *Martincic v. Urban Redevelopment Auth. of Pittsburgh*, 844 F.Supp. 1073, 1076-77 (W.D.Pa.), *aff'd*, 43 F.3d 1461 (3d Cir.1994) (holding that there is no disparate impact liability under ADEA); *Gehring v. Case Corp.*, 43 F.3d 340, 342 (7th Cir.1994), *cert. denied*, 515 U.S. 1159, 115 S.Ct. 2612, 132 L.Ed.2d 855 (1995) (disparate impact theory of liability unavailable in Seventh Circuit); *Furr v. Seagate Technology, Inc.*, 82 F.3d 980, 987 (10th Cir.1996), *cert. denied*, --- U.S. ----, 117 S.Ct. 684, 136 L.Ed.2d 608 (1997) (disparate impact claims not cognizable under the ADEA).

Other circuit courts of appeal have recognized the issue, and continue to assume, often without any discussion, that disparate impact liability applies to ADEA claims. *See Graffam v. Scott Paper Co.*, 60 F.3d 809 (1st Cir.1995) (assuming arguendo that disparate impact analysis applies, but recognizing the issue); *District Council 37 v. New York City Dep't of Parks and Recreation*, 113 F.3d 347, 351 (2d Cir.1997) (relying on Second Circuit precedent decided before *Hazen Paper*); *Lyon v. Ohio Education Ass'n*, 53 F.3d 135, 139-40 n.5 (6th Cir.1995) (recognizing that there is considerable doubt whether an ADEA claim can exist under a disparate impact theory); *Smith v. City of Des Moines*, 99 F.3d 1466, 1469-70 (8th Cir.1996) (recognizing the issue, but following Eighth Circuit, post-*Hazen Paper* precedent);

Mangold v. California Public Util. Comm'n, 67 F.3d 1470, 1474 (9th Cir.1995) (recognizing the issue, but following Ninth Circuit, pre- *Hazen Paper* precedent); *Koger v. Reno*, 98 F.3d 631, 639 (D.C.Cir.1996) (assuming without discussion that disparate impact analysis applies in ADEA cases).

Prior to *Hazen Paper*, the Sixth Circuit allowed a disparate impact claim to proceed under the ADEA. *See Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 872 (6th Cir.1990). Since that time, the Sixth Circuit, while recognizing that disparate impact theories of liability may not apply in ADEA cases, has not decided the issue one way or the other. *See Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042 (6th Cir.1998); *Lyon*, 53 F.3d at 139-40 n.5; *see also Brothers v. NCR Corp.*, 885 F.Supp. 1043, 1049 (N.D.Ohio 1995). In the absence of express statutory language precluding disparate impact claims under the ADEA, or a clear holding of the United States Supreme Court or the Sixth Circuit disallowing such claims, this court will assume, without deciding, that the plaintiffs can raise a disparate impact claim in this age discrimination case.

2. Do the Hiring Criteria Have a Disparate Impact on Older Applicants?

Assuming that disparate impact liability applies in an age discrimination case such as this one, to establish a *prima facie* case of age discrimination under this theory, the plaintiffs must show that (1) the employer has a specific employment practice; (2) there is an adverse impact on older potential employees (usually proven by statistical evidence); and (3) there is a causal relationship between the practice and

the adverse impact. *See Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 657, 109 S.Ct. 2115, 2125, 104 L.Ed.2d 733 (1989).[13] If the plaintiffs are able to make out a *prima facie* case under a disparate impact theory, then the burden of production shifts to the defendant to show that the hiring criteria are a "business necessity." *Wards Cove*, 490 U.S. at 658, 109 S.Ct. at 2125. The court must consider not only the employer's justifications for its business practices, but also the availability of alternative practices to achieve the same business ends. *Id.*

In its motion for summary judgment, the defendant argues that the plaintiffs cannot establish a *prima facie* case under a disparate impact theory because they cannot show that there has been an adverse impact on older potential employees or that the hiring criteria adopted by the company "caused" any adverse impact on older potential employees. First, on the issue of whether the hiring criteria have resulted in an adverse impact on older employees, generally plaintiffs must come forward with statistical evidence showing that the employer's business practices, although facially neutral, have an adverse impact on a particular group of employees, in this case, older employees. *See Wards Cove*, 490 U.S. at 650-51, 109 S.Ct. at 2121. The only statistical evidence upon which the plaintiffs rely is found in an attachment to the affidavit of plaintiff Eledge which shows the birth dates of the newly hired chemical operators at Rohm and Haas from March 1993

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[13] *Wards Cove* is a Title VII case, but the disparate impact analysis would apply to this age discrimination case, as well. *See Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 872 (6th Cir.1990).

to October 1996.[14] That attachment shows that seventy-one persons were hired as chemical operators from March 1993 to July 1, 1996. Of these seventy-one persons, thirty-six were age forty or older. The plaintiffs, however, urge the court to consider only those employees hired from September 1994 to December 1996, when the plaintiffs filed their lawsuit in this court. If the court considers this group of sixty-three employees, six were over the age of forty when hired. The court finds that the proper group of newly hired employees to be considered are those hired after the hiring criteria went into effect but before the plaintiffs filed their EEOC complaint. In this period from September 1994 to July 1, 1996, Rohm and Haas hired forty new chemical operators, five of whom were over forty years old when hired. As of June 1997, 208 persons were employed in hourly positions at the Knoxville plant, seventy-two percent of whom were forty years old or older.

Whichever group of newly hired chemical operators is used, the plaintiffs have the burden of comparing the ages of the qualified available persons in the labor market with those who were actually hired. *See Wards Cove*, 490 U.S. at 650-51, 109 S.Ct. at 2115; *Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 873-74. The only attempt at such a comparison is the plaintiffs' assertion in their sur-reply brief, pp. 13-14, that forty-nine percent of the relevant labor pool in

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[14] The cut-off for comparing the ages of the newly hired chemical operators, however, should be the date the plaintiffs filed their EEOC claim, July 1, 1996.

the Knoxville area is over the age of forty.[15] This comparison is too broad. The relevant labor pool in the Knoxville area surely includes persons who may or may not be able to read and write, may or may not have a high school education, and may or may not even be seeking employment. Thus, the relevant labor pool in Knoxville cannot be the proper group to compare with the persons actually hired as chemical operators, since that labor pool is neither qualified nor available. The proper group for comparison would be that part of the labor pool which is qualified and available. As the Supreme Court pointed out in *Wards Cove*, if the court allowed the kind of comparison that the plaintiffs suggest here, any employer whose workforce had fewer workers over the age of forty than the general labor pool "could be haled into court and forced to engage in the expensive and time-consuming task of defending the "business necessity" of the methods used to select the other members of the workforce." *Wards Cove*, 490 U.S. at 652, 109 S.Ct. at 2122.

In addition to the plaintiffs' attempted comparison of newly hired employees with the relevant labor pool in the Knoxville area, the plaintiffs say in their sur-reply brief: "There would be no way for the plaintiffs to garner the statistics needed using the defendant's proposed procedure [comparing the ages of the newly hired employees with the qualified available labor pool]. It would take questioning each member of the labor pool." Thus, the plaintiffs recognize that other comparisons could be made, but with difficulty.

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[15] The plaintiffs have not defined "relevant labor pool," so the court will assume it means the entire labor pool in the Knoxville area.

Even if the court assumes the plaintiff has shown an adverse impact on older workers by identifying a group in which only ten percent of the newly hired chemical operators were age forty or over, the plaintiffs still must show that the adverse impact was **caused** by the defendant's hiring criteria. *See Wards Cove*, 490 U.S. at 657, 109 S.Ct. at 2124-25. What the plaintiffs must demonstrate is that the defendant's hiring criteria have a significantly disparate impact on employment opportunities for older and younger employees. *Id.*

The court concludes, after considering each of the hiring criteria individually, that the plaintiff has not and cannot show that the hiring criteria caused any disparate impact on older workers. First, it appears to the court that the criterion requiring five years' experience in chemical plant operations weighs in favor of older employees. Young persons just starting out in the job market would not have this experience, whereas older employees could have gained this required experience. The court finds that no reasonable trier of fact could conclude that requiring five years' relevant chemical operator experience causes a disparate impact on older workers.

Next, if the applicant does not have chemical operator experience, a relevant four-year degree from an accredited college or university will suffice. The plaintiffs have not provided the court with any evidence that a college degree in a relevant field is an advantage that younger employees have over older employees. The court finds that no reasonable trier of fact could conclude, based on the evidence before the court, that requiring a relevant four-year degree from an

accredited college or university causes a disparate impact on older workers.

Finally, an applicant will be considered for a position as a chemical operator if he or she has an Associate Degree in Chemical and Environmental Engineering Technology from Pellissippi State, or an equivalent degree from another school. Once again, the plaintiffs have not provided the court with any evidence that a two-year associate degree is an advantage that younger employees have over older employees. There is no evidence that younger persons are more likely to earn a degree in the Chemical and Environmental Engineering Technology program at Pellissippi State or any other community college. The court finds that no reasonable trier of fact could conclude, based on the record before the court, that requiring an Associate Degree in Chemical and Environmental Engineering Technology from Pellissippi State, or an equivalent degree from another school, causes a disparate impact on older workers.

Therefore, the court finds that the plaintiffs have failed to establish their *prima facie* case of disparate impact. Nevertheless, the court will assume for the sake of argument that the plaintiffs have overcome this hurdle, and will address the next part of the analysis; that is, whether the defendant can show a reasonable business necessity for adopting the hiring criteria. The court has already discussed Rohm and Haas' business justification for adopting the hiring criteria, and that discussion will not be repeated here. *See* B.2, *supra*. The court finds that there is no genuine issue of material fact that the hiring criteria were designed to meet legitimate business ends; that is, to increase the chemical operators' skill levels without extensive training costs.

Finally, on the issue of whether there are alternative practices that would achieve the same business ends, the plaintiffs suggest only that on-the-job training is a reasonable alternative practice to would achieve Rohm and Haas' business goals. The evidence before the court is that on-the-job training costs are much higher when the employees do not meet the hiring criteria, so this is not a reasonably alternative for the company. In the absence of any other alternatives, the plaintiffs have failed to rebut the defendant's business necessity defense.

The court finds that even if a disparate impact liability theory applies in age discrimination cases, the plaintiffs have failed to raise a genuine issue of material fact that Rohm and Haas' hiring criteria caused an adverse impact on older applicants for chemical operator positions, or that the hiring criteria were not adopted for legitimate business reasons.

CONCLUSION

For the reasons stated above, the court finds the plaintiffs have failed to make out a case of age discrimination under either a disparate treatment or disparate impact theory. Therefore, the defendant's motion for summary judgment will be granted, and an Order reflecting this opinion will be contemporaneously entered.

ENTER:

/s/_____
Leon Jordan
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed December 28, 1999]

No. 98-6186

DELLA J. BROWNING; JAY ELEDGE *Plaintiffs - Appellants*	)
v.	)
ROHM & HAAS COMPANY, *Defendant - Appellee*	)

ORDER

BEFORE: MERRITT and CLAY, Circuit Judges; ALDRICH, District Judge*

Upon consideration of the petition for rehearing filed by Appellants Della Browning & Jay Eledge,

* The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

It is **ORDERED** that the petition for rehearing be, and it here is, **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk